COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2015-SC-000256-DG

COMMONWEALTH OF KENTUCKY,
SECRETARY OF LABOR, ET AL. — APPELLANT

V.

Court of Appeals No. 2013-CA-001501
Franklin Circuit Court No. 2012-CI-00962

ESTILL COUNTY FISCAL COURT — APPELLEE

BRIEF OF APPELLEE, ESTILL COUNTY FISCAL COURT

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CERTIFICATE OF SERVICE

It is hereby certified that true and accurate copies of the foregoing were hand-delivered on April 4, 2016, to Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, State Capitol Building, Room 209, 700 Capitol Avenue, Frankfort, KY 40601, and sent by first class U.S. mail to Samuel P. Givens, Jr., Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601, Frederick G. Huggins, Kentucky Occupational Safety and Health Review Commission, #4 Mill Creek Park, Frankfort, KY 40601; and the Hon. Judge Thomas Wingate, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601. I further certify that I did not withdraw the record on appeal.

Counsel for Appellee

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee welcomes oral argument.

INTRODUCTION

This is an appeal by the Kentucky Occupational Safety and Health Review Commission ("the Commission") from a decision of the Kentucky Court of Appeals, which reversed the Franklin Circuit Court's affirmation of a final order entered by the Kentucky Occupational Safety and Health Review Commission. The Secretary of Labor for the Commonwealth of Kentucky, a party to this appeal below, requested dismissal of its appeal after this Court granted the Secretary of Labor and the Commission's Motions for Discretionary Review. This Court granted the Secretary of Labor's motion to dismiss. The Estill County Fiscal Court and the Commission remain as the only parties to this appeal, which primarily concerns the authority of the Commission under KRS Chapter 338.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

At all relevant times in this case Mary Smith ("Ms. Smith") was employed by the Estill County Fiscal Court ("Estill County") as a part-time on-call dispatcher, and she was removed from the on-call schedule on August 6, 2010. It is further undisputed that on July 19, 2010, Ms. Smith sent a letter to Estill County Judge Executive Wallace Taylor ("Judge Executive Taylor") in which Ms. Smith asserted that she suffered from an allergy to cigarette smoke and that exposure to secondhand smoke caused her severe pain and posed a serious risk to her health. [August 23, 2011 Hearing Transcript (hereafter "TR")].[1]

In her letter, Ms. Smith asserted that allowing smoking in the dispatch room was a violation of KRS 61.165, a state law regarding smoking in state buildings that does not apply to county governments. [TR, Exhibit 3]. Due to Ms. Smith's stated health concerns, Estill County determined that it was in Ms. Smith's and Estill County's best interests that she be removed from the call schedule until such time as exposure to secondhand smoke was no longer a concern. [TR, p. 80]. On August 6, 2010 Judge Executive Taylor ordered Ms. Smith to be temporarily removed from the work schedule in order to ensure Ms. Smith's wellbeing. In response, Ms. Smith subsequently lodged a complaint with the Kentucky Labor Cabinet alleging that Estill County took an adverse employment action against her in retaliation for Ms. Smith's letter to Judge Executive Taylor. Officials from the Kentucky Labor Cabinet, Occupational Safety and Health Program ("the Cabinet"), agreed with Ms. Smith and issued a citation to Estill County for

[1] The transcript is part of the administrative record that is identified in the Certification of Record on Appeal as "Expandable file folder containing administrative record." Likewise, the Commission's Final Order is also contained in the expandable file. For the Court's convenience, the transcript and Final Order are also attached as **Appendix Tab 1**.

violation of KRS 338.121(3)(a), which prohibits employers from discriminating against employees who file complaints about workplace safety:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or herself or others of any right afforded by this chapter[.]

KRS 338.121(3)(a).

According to the Cabinet's investigator, Ms. Smith's letter constituted a protected activity under KRS 338.121(3)(a) because it "brought to the Company's attention that it was a health hazard for her to breathe the secondhand smoke." [TR, p. 80]. Moreover, the Cabinet's investigator concluded that Estill County's decision to remove her from the call schedule was unlawful retaliation in violation of KRS 338.121(3)(a) because Estill County's response "blatantly just says, we took you off the schedule because of the smoking." [TR, p. 80-81]. According to the investigator, rather than take Ms. Smith off of the schedule, upon receiving the letter from Ms. Smith, Estill County should have either (1) made the dispatch room "smoke free" [TR, p. 88]; (2) refused to make any change and allowed Ms. Smith to work in an environment which caused her physical harm and risked liability for Estill County [TR, p. 80]; or (3) "taken her off the schedule and still paid her." [TR, p. 93]. The investigator also admitted, however, that there is no law or regulation in Kentucky that makes secondhand smoke a health hazard or in any way requires an employer to accommodate an employee's aversion to secondhand smoke. [TR, p. 89].

Estill County requested review of the citation by the Kentucky Occupational Safety and Health Review Commission (the "Commission"), arguing that Ms. Smith's letter to Judge Executive Taylor did not constitute a protected activity under KRS 338.121(3)(a). Estill County argued before the Commission that because Kentucky had conspicuously declined to promulgate or adopt any regulation defining an employee-to-employer communication as a protected activity under KRS 338.121(3)(a), that the letter from Ms. Smith should not be classified as such.

However, the Commission, adopting its hearing officer's recommendation, agreed with the Cabinet that the letter to Judge Executive Taylor was a protected activity and that Estill County's response was unlawful. [*See* Commission Final Order, attached hereto as **Appendix Tab 2**.] Significantly, the Commission's Final Order based its ruling upon an unpublished federal district court opinion from Georgia, which in turn relies on a federal regulation not adopted by Kentucky, holding that an employee's "good faith health and safety complaint to an employer [is] a protected activity." *See Chao v. Blue Bird Corp.*, 2009 WL 485471 (D.C.M.D. Ga., 2009), attached hereto as **Appendix Tab 3**. The Commission ordered that Ms. Smith be reinstated, and that Estill County pay a civil penalty, back pay from the date of August 6, 2011, through the date of the hearing, and front pay until such time as Ms. Smith was reinstated. Estill County appealed the Commission's decision to Franklin Circuit Court on the following grounds: (1) the Commission's finding that Ms. Smith's letter to Judge Executive Taylor was a protected activity exceeds its authority and is not supported by substantial evidence; (2) the Commission's finding that Ms. Smith was removed from the call schedule in retaliation for the protected activity exceeds its authority and is not supported by substantial

evidence; (3) the Commission acted arbitrarily and exceeded its authority in ordering back pay, front pay and re-instatement because it unlawfully subjected Estill County and its citizens to a perpetual fine and injunction and intruded upon Estill County's sovereign policy making and governing authority; and (4) the Commission's Final Order and the fines, penalties, and/or remedies imposed exceed its authority because they are barred by absolute sovereign immunity.

On August 1, 2013, the Franklin Circuit Court entered an Opinion and Order affirming the Commission's Final Order. [*See* Franklin Circuit Court Order, attached hereto as **Appendix Tab 4**.] The Opinion and Order relied on the Middle District of Pennsylvania's decision in *Marshall v. Springville Poultry Farm, Inc.*, 445 F. Supp. 2, 3 (M.D. Pa. 1977) to hold that making a complaint to an employer constituted a protected activity under KRS 338.121(3)(a). Significantly, *Marshall* cites to, and relies upon, the same federal regulation as the one relied upon by *Chao*. The Opinion and Order then held that the record was "replete with substantial evidence" supporting the Commission's findings that the adverse action was substantially motivated by Ms. Smith's letter to Judge Executive Taylor, and that the proffered nondiscriminatory reasons were pretextual, but did not actually identify any of this evidence. The Circuit Court also held that KRS chapter 338 vests the Commission with authority to order back pay, front pay, and re-instatement against county governments, and that KRS chapter 338 is a waiver of Estill County's sovereign immunity. The Circuit Court did not address the Appellee's argument that the Commission exceeded its authority by attempting to regulate second hand smoke as an occupational safety and health hazard even though it is not recognized as such under Kentucky law. The Circuit Court also did not address Estill County's

argument that the Commission's Final Order exceeds its authority by forcing Estill County to either (1) ban smoking in order to accommodate an employee who expresses an allergy to smoke, or (2) put an individual in a situation that "causes swelling in the head and severe pain."

On February 27, 2015, the Court of Appeals reversed the Franklin Circuit Court's Judgment. [*See* Court of Appeals Opinion, attached hereto as **Appendix Tab 5.**] Chief Judge Glen Acree, writing for the Court of Appeals, agreed with the Estill County Fiscal Court that the Commission exceeded its authority and impermissibly engaged in policy-making by relying upon a federal regulation, 29 C.F.R. 1977.9, which had not been adopted by the Kentucky Occupational Safety and Health Standards Board (the "Board"). The Court of Appeals reasoned that under the Kentucky Occupational Safety and Health Act ("KOSHA"), the Board had the exclusive authority to engage in rule-making and that "[b]ecause the Board has neither adopted 29 C.F.R. § 1977.9, nor promulgated a similar rule, such complaints remain outside the scope of KRS 338.121(3)(a)." [Court of Appeals Opinion, p. 7.] Chief Judge Acree went on to reason that "[w]hen the [Commission] cited federal case law relying on a regulation that the Board never endorsed, the [Commission] effectively expanded the kinds of complaints protected by KRS 338.121(3)(a)." [*Id.*]

Appellant subsequently sought discretionary review, which this Court granted. However, following the decision of the Court of Appeals, the Board drafted an amendment to 803 KAR 2:250, a regulation relating to KRS 338.121, which now includes the following language: "'Complaint' means any oral or written communication related to an occupation safety and health concern **made by an employee to an**

employer, governmental agency, or made to the commissioner or to the commissioner's designee." 803 KAR 2:250(3). The Board's amendment took effect on October 2, 2015—prior to the amendment, there was no language in the regulation defining communications from employees to employers as a "complaint". As discussed herein, the fact that the Board amended 803 KAR 2:250 in October, 2015, to categorize employer to employee communications as a complaint under KRS 388.121 in no way validates Appellant's position that such an interpretation was proper prior to the amendment. Indeed, the passage of the amendment by the Board demonstrates the proper procedure under KOSHA's split-enforcement model for the adoption of federal standards and implies that Kentucky law did not heretofore define a complaint under KRS 388.121 as encompassing communications from employees to employers.

Accordingly, because the Court of Appeals was correct in its holding that the Commission usurped the authority of the Board in relying upon a federal regulation that had not been adopted or endorsed by the Board, and for the other reasons stated herein, that holding should be affirmed.

ARGUMENT

I. Standard Of Review:

In reviewing an agency's decision the Court must address three issues:

> The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. (citation omitted). Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. (citation omitted). If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406, 409 (Ky. App. 1994). Substantial evidence is "evidence that 'when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.'" *Terminix Intern., Inc. v. Secretary of Labor*, 92 S.W.3d 743, 747 (Ky. App. 2002).

Estill County recognizes that this Court is not bound to defer to a lower court's interpretation of statute. *Osborne v. Commonwealth*, 185 S.W.3d 645, 648 (Ky. 2006) ("Because the construction and application of statutes is a question of law, it is subject to de novo review on appeal."). However, as discussed below, the Court of Appeals is correct in concluding that that the Commission exceeded its statutory authority and thus rendered an arbitrary decision. Furthermore, although the Court of Appeals never ruled on Estill County's arguments that 1) the Commission's findings were not supported by substantial evidence, 2) the Commission acted outside its authority in ordering back pay, front pay, and reinstatement, and 3) that the Commission's Final Order and the fines, penalties, and/or remedies imposed are barred by absolute sovereign immunity, this Court

may affirm the ruling of Court of Appeals on alternative grounds. *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991) ("[W]e, as an appellate court, may affirm the trial court for any reason sustainable by the record.").

II. The amended version of 803 KAR 2:250 does not apply to the case at bar.

As an initial matter, the current iteration of 803 KAR 2:250, providing that an employee to employer communication constitutes a complaint under KRS 338.121, does not apply retroactively to this case. "No statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080. Although KRS 446.080 refers only to statutes, this same rule has been applied to regulations. *United Sign, Ltd. v. Commonwealth*, 44 S.W.3d 794, 799 (Ky. App. 2000) ("The statutes and regulations in effect at the time a permit application is filed govern whether that permit shall be approved as statutes shall not generally be given retroactive application."); *see also Bauer v. Varity Dayton–Walther Corporation*, 118 F.3d 1109, 1111 n. 1 (6th Cir. 1997) ("Regulations, like statutes, are ordinarily presumed not to have retroactive effect"). 803 KAR 2:250 does not expressly declare that it is retroactive, and thus cannot be deemed to have that effect. Furthermore, any argument by the Appellant to the contrary has been waived. *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979) ("The reply brief is not a device for raising new issues which are essential to the success of the appeal.").

To the extent this Court considers the amendment relevant at all, the amendment demonstrates that the plain language of KRS 338.121 did not encompass complaints from an employee to an employer, prior to the amendment. Furthermore, the promulgation of the amendment by the Board (and not the Commission) demonstrates the proper procedure by which such regulations are to be incorporated into KOSHA.

III. The Court of Appeals was correct when it held that the Commission's finding that Ms. Smith's letter to Judge Executive Taylor was a protected activity is contrary to Kentucky law and is not supported by substantial evidence.

In order to find against Estill County, the Commission was first required to find that Ms. Smith engaged in a protected activity under KRS 338.121. *Terminix Int'l, Inc. v. Secretary of Labor*, 92 S.W.3d 743, 747-48 (Ky. App. 2002). There, this Court explained:

> *Mt. Healthy City Sch. Dist. Bd. of Edu. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), provides the procedure for determining whether a violation of an anti-retaliation statute, such as KRS 338.121, occurred. *Boston Gear*, 25 S.W.3d at 134. First, a *prima facie* case of discrimination must be established. *Id.* To establish a *prima facie* case, the Secretary of Labor must prove that the employee engaged in protected activity that was a motivating factor to the employer in a subsequent adverse employment decision against the employee. *Mt. Healthy City Sch. Dist. Bd. of Edu.*, 429 U.S. at 287, 97 S.Ct. 568. In *First Property Management Corp. v. Zarebidaki*, Ky., 867 S.W.2d 185 (1993), the court indicated that the motivating factor must be "substantial," but it noted that "substantial motivating factor" does not mean "primary" or "sole" motivating factor. *Id.* at 186, 188–89. After the *prima facie* case is established, if the employer seeks to overcome the presumption that arises, it must show that the same action would have been taken even had the employee not engaged in protected activity. *Boston Gear*, 25 S.W.3d at 134.

Id.

Here, the Commission's Final Order found that Ms. Smith engaged in a protected activity under KRS 338.121 by writing a letter to Judge Executive Taylor dated July 19, 2010. [Final Order, ¶ 24] KRS 338.121 provides in relevant part that:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter...

KRS 338.121(3)(a).

Thus, in order for the letter to be a protected activity, it must constitute a "complaint" that is "under or related to" KRS Chapter 338. The Commission's finding that the July 19, 2010 letter to Judge Executive Taylor constituted protected activity under KRS 338.121 is legally incorrect for two reasons. First, as a matter of law, Ms. Smith's letter to Judge Executive Taylor does not constitute a protected activity because the subject matter of her complaint is not an occupational safety or health hazard as defined by Kentucky Law. Second, while some federal district courts have held that complaints by employees to their employers constitute protected activity under KRS 338.121, this issue has never been addressed by Kentucky courts. Furthermore, the federal district court decisions cited by the Commission and the Franklin Circuit Court are inapplicable because they rely on a federal regulation that Kentucky specifically chose not to adopt at the time of the hearing. Therefore, those decisions should be rejected by this Court.

A. The Commission acted contrary to law and exceeded its authority when it concluded that Ms. Smith's letter complained about a matter "under or related to" KRS Chapter 338.

Ms. Smith's letter to Judge Executive Taylor raised two specific issues. First, she asserted that she had an individual allergy to secondhand smoke that caused her to suffer severe pain if exposed to it. Second, she mistakenly asserted that smoking in County-owned buildings was barred by KRS 61.165, and "200 KAR 6.045." The former is not a complaint under or related to KRS Chapter 338 because neither the Kentucky legislature nor the Commission has actually deemed secondhand smoke to be an occupational safety and health hazard under Kentucky law, and Ms. Smith's individual allergy to second hand smoke is therefore no different than any other individual allergy or medical

condition. The latter is not a complaint under or related to KRS Chapter 338 because KRS 61.165 is part of a completely separate statutory section and there is no regulation at "200 KAR 6.045."

The Commission's Final Order is based upon a legal conclusion that second hand smoke constitutes an occupational safety and health hazard in Kentucky. According to the Commission:

> Estill County argued that complaining to an employer is only a protected activity if it concerns a violation of occupational safety and health standard, and that second hand cigarette smoke does not violate an occupational safety and health standard but concerns only a physical condition unique to Ms. Smith. In reality environmental tobacco smoke ("ETS") is a well-recognized health hazard, *see Reynolds v. Bucks*, 833 F.Supp.518, 520 fn. 5 (E.D. Pa., 1993), and some states have established occupational safety and health standards regulating ETS in the workplace, *see Fogle v. H&G Restaurant, Inc.*, 654 A.2d 449 (Md. 1995); *Aviation West Corp. v. Washington State Dept of Labor*, 980 P.2d 701 (Wa. 1999). Even in Kentucky, employers are required to furnish a place of employment free of recognized hazards pursuant to KRS 338.031(1)(a).

[Final Order, ¶ 24.]

While it may be true that a federal court in Pennsylvania has determined that ETS is a health-hazard, and that other states have chosen to establish occupational safety and health standards regulating ETS in the workplace, it is also indisputable that the Kentucky legislature has not recognized ETS as a health-hazard and the Board has not established any regulations concerning ETS in the workplace. If the Kentucky legislature believes ETS to be a health-hazard, it can legislate the issue. If the Commission believes ETS to be a health hazard, it can urge its colleagues on the Board to issue appropriate regulations. But with both the legislature and the Board having failed to enact any laws

or regulations concerning ETS, the Commission cannot impose back door prohibitions on smoking in the workplace through its review of a citation. Absent lawfully enacted legislation or regulations governing ETS, Ms. Smith's complaint about her cigarette allergy is not legally distinguishable from an employee complaining about a food allergy or other personal medical condition. Such a complaint is not "under or related to" KRS Chapter 338, and therefore cannot be grounds for a KRS 338.121 retaliation claim.

As for Ms. Smith's Complaint that Estill County's smoking policy violated KRS 61.165 or 200 KAR 6.045, these have no legal relationship to KRS Chapter 338. KRS Chapter 61.165 is part of the general provisions governing state, county, and local governments set forth in KRS 61.010 – KRS 61.409. Moreover, KRS 61.165 limits counties' abilities to restrict smoking in government buildings by requiring that any such policy be: (1) enacted by the legislative body of the government; (2) be in writing; (3) provide an indoor smoking area in any building that restricts smoking; and (4) favor allowing smoking in open public areas if feasible. KRS 61.165(2). Thus, KRS 61.165 actually encourages smoking in public buildings and restricts a county's ability to curtail such smoking. Finally, there simply is no regulation at "200 KAR 6.045", so any alleged violation of this non-existent regulation cannot be "under or related to" KRS Chapter 338.

As such, Ms. Smith's complaint that Estill County violated KRS 61.165 or 200 KAR 6.045 is not a complaint "under or related to" KRS Chapter 338.

B. The Court of Appeals is correct in finding that the Commission acted contrary to law when it found that Ms. Smith *filed a complaint* related to KRS Chapter 338 by writing a letter to her employer.

As an initial matter, the Court of Appeals discussion of the history and purpose behind KOSHA and the separation of powers embodied in KOSHA's legislative scheme

is informative. The Court of Appeals reasons that because KOSHA, like OSHA, is a split-enforcement regime, it reserves certain powers to each of its respective branches. KOSHA features a three-prong branch of governance, not unlike the federal model comprised of the legislative, judicial, and executive branches. Under KOSHA, regulatory authority is divided among three administrative agency actors: 1) The Board, (2) The Commission, and 3) The Cabinet.

The Board is the quasi-legislative arm of KOSHA and is comprised of twelve members who are appointed by the Governor, with the Secretary of Labor serving as its chairperson. KRS 338.051(1). Pursuant to KRS 338.051(3), the Board is the only agency tasked with "promulgat[ing] occupational safety and health rules, **regulations**, and standards." "As such, the Board remains KOSHA's lone policy-making entity and thus acts as the prime mover of KOSHA's regulatory universe." [Court of Appeals Opinion at 10.]

The Cabinet is responsible for carrying out executive duties under KOSHA, meaning that it may conduct investigations and issue citations regarding any violations of law under KOSHA. KRS 338.051. Though, as the Court of Appeals points out "[i]n essence, the [Cabinet] acts as KOSHA's prosecutor, charged with enforcing regulations promulgated by the Board . . . [h]owever, like any prosecutor, the [Cabinet] may not issue citations based on violations of nonexistent rules." [Court of Appeals Opinion at 10.]

Finally, quasi-judicial power is allocated to the Commission. The Commission consists of three members "appointed by the Governor on the basis of their experience and competence in the fields of occupational safety and health." KRS 338.071(1).

Pursuant to KRS 338.071(4), the Commission is to "hear and rule on appeals from citations, notifications, and variances issued under the provisions of [KRS Chapter 338]." Significantly, unlike the Board, the Commission's power in promulgating regulations is limited to those regulations related to "the procedural aspect of its hearings." KRS 338.071(4). "The [Commission] thus functions as a neutral arbiter assigned by the legislature to determine whether the [Cabinet's] citations are valid in light of the standards set forth by the Board." [Court of Appeals Opinion at 11.]

In finding that Ms. Smith's letter to Judge Executive Taylor constituted a protected act, the Commission relied upon the District Court for the Middle District of Georgia's decision *Chao v. Blue Bird Corp.*, 2009 WL 485471 (D.C.M.D. Ga. 2009) to hold that "making a good faith health and safety complaint to an employer is a protected activity." The Franklin Circuit Court reached the same conclusion, but based its decision upon Middle District of Pennsylvania's decision in *Marshall v. Springville Poultry Farm, Inc.*, 445 F. Supp. 2, 3 (M.D. Pa. 1977). Both *Chao* and *Marshall* relied upon 29 C.F.R. § 1977.9 for their holdings. *Id.* For example, in *Chao* the Court stated:

> "The range of complaints 'related to' the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application, which entails the full extent of the commerce power." 29 C.F.R. § 1977.9(a). "Further, the salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers. Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer." 29 C.F.R. § 1977.9(b).

Chao v. Blue Bird Corp., 2009 WL 485471 (M.D. Ga. Feb. 26, 2009) *aff'd sub nom. Solis v. Blue Bird Corp.*, 404 F. App'x 412 (11th Cir. 2010). And in *Marshall* the Court held:

> In 29 C.F.R. § 1977.9(c), the Secretary interpreted a 660(c)(1) complaint to include a complaint filed by an employee with his employer concerning occupational safety. The Court agrees with interpretation and with the Secretary's reasoning that the "salutary principles of the Act would be seriously undetermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers." 29 C.F.R. § 1977.9(c)(1). Moreover, the complaint filed in this case concerns the same subject matter as the Act and would surely tend to further its purposes.

Marshall v. Springville Poultry Farm, Inc., 445 F. Supp. 2, 3 (M.D. Pa. 1977). This issue has not been addressed by a Kentucky state court or a Federal Court in the Sixth Circuit.

In relying on *Chao* and *Marshall*, the Franklin Circuit Court and the Commission essentially adopted a federal regulation that, at the time, Kentucky specifically chose not to adopt. Estill County acknowledges that where KRS Chapter 338 is patterned after federal law it is to be interpreted consistent with federal law. *Kentucky Labor Cabinet v. Graham*, 43 S.W.3d 247, 253 (Ky. 2001) *abrogated by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004). This does not, however, mandate that KRS Chapter 338 be interpreted in accordance with federal regulations that are not reflected in the Kentucky Statutes and have not been adopted by the Kentucky Commission. If Kentucky wanted to adopt 29 C.F.R. § 1977.9, the Board had the authority and means to do so, as demonstrated by the Board's recent promulgation of the amendment to 803 KAR 2:250. Indeed, it is significant to note that at the time of the hearing before the Commission, Kentucky had adopted provisions of the C.F.R. in 803 KAR sections 301, 400, 401, 407, 409, 415, 416, 419, 421, 423, and 430. Conspicuously though, Kentucky had not adopted 29 C.F.R. § 1977.9. Thus, 29 C.F.R. § 1977.9 was not the law in Kentucky at the time of the Commission's decision, and their reliance on it in ruling against Estill County constituted an arbitrary decision because the Commission essentially adopted that federal regulation,

in violation of the separation of powers mandated in KOSHA. In spite of the Appellant's assertion that "[t]he standards board has very little power[,]"[2] the Board is the sole agency tasked with promulgating regulations pursuant to KRS 338.051(3).

Furthermore, when read independently from 29 C.F.R. § 1977.9, the plain language of KRS 338.121 does not make a letter from an employee to her employer a protected activity. The statute states that "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter . . . ." KRS 338.121. The plain meaning of having "filed any complaint or instituted or caused to be instituted any proceeding" is to have *filed* some sort of legal claim or otherwise initiated some sort of legal process or proceeding. If the legislature had intended "filed any complaint or instituted or caused to be instituted any proceeding" to include any possible sort of objection made to any person, regardless of whether or not it had any legal impact, it would have used broader language as it did in other anti-retaliation statutes. For example, KRS 344.280 makes it unlawful to retaliate against a person who has "opposed a practice declared unlawful by this chapter, or because he had made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter." KRS 344.280(1). The phrase "opposed a practice" is a deliberately broad statement that encompasses any manner of conduct by an employee objecting to an alleged legal violation, and is exactly the kind of language that the legislature would have used if it intended to impose a similar scope to

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[2] [Appellant's Brief at 26.]

protected activity under KRS 338.121. But the legislature did not include such language, and the Court should not interpret the statute to be broader than its plain meaning.

Appellant cites to *Terminix Int'l, Inc. v. Sec'y of Labor*, 92 S.W.3d 743 (Ky. App. 2002), arguing that it stands for the proposition that an employee-to-employer communication such as the letter to Judge Executive Taylor constitutes the "fil[ing] a complaint" for the purposes of KRS 338.121. Appellant goes on to argue that the Court of Appeals opinion conflicts with *Terminix*, and that the Court of Appeals erred in not addressing this conflict. However, *Terminix* is inapposite for several reasons.

In *Terminix*, the Plaintiff, an employee of Terminix International, Inc., became ill and went into a semicomatose state after coming into contact with chemicals used in extermination of pests. *Id.* at 745. Among the issues the Court faced in *Terminix* was whether a phone call from the Plaintiff's mother to the Plaintiff's employer, during which she threatened to "call OSHA" constituted a protected activity under KRS Chapter 338. *Id.* at 748. The Court of Appeals, noting the Commission's reliance on two federal cases *Kennard v. Louis Zimmer Communications, Inc.*, 632 F.Supp. 635 (E.D.Pa 1986), and *Donovan v. Freeway Construction Co.*, 551 F.Supp. 869 (D.R.I. 1982), held that the Plaintiff's mother's phone call to Terminix on her son's behalf constituted a protected activity.

However, neither *Kennard* nor *Donovan* addressed the issue of what constitutes a "filing a complaint" under OSHA. While both cases involved communications from relatives to authorities regarding potential OSHA violations, those communications were made to the regulatory authority themselves, and not the employer. In *Kennard*, an employee's husband made a phone call to OSHA complaining about the lack of

ventilation in an office where his wife was exposed to chemicals as a result of photograph production. *Kennard*, 632 F.Supp. at 638. In *Donovan*, the complainants' mother telephoned OSHA at their behest, to report a myriad of unsafe conditions on a construction site. *Donovan*, 551 F.Supp. at 873. As such, neither case addressed whether a complaint from an employee to an employer constitutes a protected activity, but rather whether a relative can engage in a "protected activity" on behalf of their family.

The distinction between the issue raised in *Terminix* and the issue presented here is subtle but significant. Specifically, the employer in *Terminix* argued that "the statement by [its employee's mother] was not protected activity within the meaning of KRS 338.121(3)(a) because it was not an action by an 'employee.'" Any reliance on *Terminix* for the proposition that an employee-to-employer communication constitutes "filing a complaint" under KRS 338.121 is misplaced in light of the fact that that issue was not properly before the Court of Appeals in that case. While Appellant's contention that the Court of Appeals should have commented on the possibility of a perceived inconsistency of its ruling with *Terminix* is understandable, the fact is that the issue decided by the *Terminix* Court and the issue decided by the Court of Appeals in this matter is not the same and accordingly the Court of Appeals did not err in declining to distinguish or overrule *Terminix*. Had the *Terminix* Court been faced with the same arguments and evidence before the Court in the case *sub judice*, including the fact that Kentucky specifically chose not to adopt 29 C.F.R. § 1977.9, it may have come to the same conclusion as the Court of Appeals panel in this matter.

Furthermore, the substance at issue in *Terminix* was regulated under OSHA. Dursban TC is a regulated occupational safety and health hazard. In *Terminix*, the

Plaintiff's employee was hospitalized after exposure to Dursban TC, an organophosphate pesticide. *Terminix*, 92 S.W.3d at 745. While the employee was hospitalized, the employee's mother made a phone call to the employer to inform them that she was going to file a complaint with OSHA regarding the exposure. *Id.* at 748.

Dursban TC is the trade name for the chemical containing Chlorpyrifos, which is manufactured by Dow AgroSciences. *Kannankeril v. Terminix Intern., Inc.*, 128 F.3d 802, 805 (3d Cir. 1997) ("Dursban, the active ingredient in certain pesticides used by Terminix, is a formulation of chlorpyrifos, an organophosphate poison."). Chlorpyrifos is listed among the Toxic and Hazardous substances regulated by OSHA as set forth in 29 CFR 1910, Subpart Z. [*See* OSHA Guidance for Hazard Determination, Appendix C "Toxic and Hazardous Substances", attached as **Appendix Tab 6**].[3]

Conversely, secondhand smoke, the substance at issue in this case, is not regulated under KRS Chapter 338. Indeed, the Appellant conceded this point in its brief before the Court of Appeals. ("[I]t is true that there is no safety and health standard dealing with the hazards of cigarette smoke[.]") [Kentucky Occupational Safety and Health Review Commission's Brief to the Court of Appeals, p. 4.] The fact that secondhand smoke is not regulated is significant, because for purposes of this appeal, the only issue is whether a complaint about exposure to secondhand smoke is covered by KRS Chapter 338, not whether it could be or should be. The prudence of the legislature's and Board's decisions not to regulate secondhand smoke is a political issue that clouded the Commission's decision, but has no bearing on the legal merits of the matter at hand.

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[3] The OSHA Guidance for Hazard Determination, including Appendix C, is published by OSHA at https://www.osha.gov/dsg/hazcom/ghd053107.html

Finally, *Terminix* is further distinguished from this case because the "protected activity" in that case was an explicit threat to file an OSHA complaint. Ms. Smith's letter did not threaten an OSHA complaint, and was instead limited to identifying her personal allergies and making incorrect statements about statutes governing smoking in state owned buildings. There was nothing in Ms. Smith's letter that indicated any relationship to OSHA – it did not make or threaten an OSHA complaint and it did not address an OSHA regulated occupational safety and health hazard. Therefore, it cannot be a protected activity.

IV. The Commission's finding that Ms. Smith was removed from the call schedule in retaliation for the protected activity exceeds its authority by being contrary to law and is not supported by substantial evidence.

The Commission asserts that the evidence overwhelmingly establishes that Ms. Smith was removed from the call schedule due to her complaint about smoking in the dispatch room [Final Order, ¶ 25], but it does not cite any such evidence. Moreover, the Commission's own findings of fact contradict such a conclusion. According to the Commission, "Mr. Taylor made the decision that rather than ban smoking in the dispatch room, Ms. Smith should be removed from the call schedule." [Final Order, ¶ 9.] Thus, the Commission expressly found that the choice that Estill County made was between banning smoking in the dispatch room or removing Ms. Smith from the call schedule. This finding substantiates Estill County's position that the reason the decision was made to remove Ms. Smith from the call schedule was not because she complained, but rather because the letter notified Estill County that Ms. Smith's continued work under the conditions that then existed constituted a danger to Ms. Smith's health. Estill County responded to this information by removing Ms. Smith from the call schedule rather than banning smoking in its dispatch room. The Commission clearly disagrees with this

choice, stating for example that "the problem could have been solved simply by banning smoking in the dispatch room" [Final Order, ¶ 29], but the fact that the Commission disagrees with the choice does not negate the fact that the choice was Estill County's to make. The Commission's finding that Estill County removed Ms. Smith from the call schedule because it did not want to ban smoking in the dispatch room expressly contradicts its conclusion that Estill County removed Ms. Smith because she complained.

Further, there is no factual support for the Commission's assertion that Ms. Smith was treated differently than another non-smoker, Ms. Letisha Morris, and that this is evidence that Ms. Smith was retaliated against for engaging in a protected activity. According to the Commission, Letisha Morris was a non-smoker who worked in dispatch while pregnant. [Final Order, ¶ 28.] The Commission asserts that the smoke in the dispatch room made Ms. Morris sick while she was pregnant, but that she did not make any complaints to management. [Final Order, ¶ 28.] Instead, she merely asked other dispatchers to air out the room before she arrived. [Final Order, ¶ 28.] The Commission asserts that because Ms. Morris did not complain to management and was not removed from the call schedule, this means Ms. Smith was discharged because she did complain. [Final Order, ¶ 28.] But this is faulty logic, completely ignoring that because Ms. Morris did not complain to management about the smoke, Judge Executive Taylor was never aware that the smoke made Ms. Morris sick. Judge Executive Taylor cannot possibly be expected to treat Ms. Morris the same as Ms. Smith when he was not aware that Ms. Morris suffered from the same issues as Ms. Smith. There is not any evidence in the record that Judge Executive Taylor ever knew smoke made Ms. Morris sick, and indeed if it had there is every reason to believe he would have removed her from the call

schedule as well to prevent further illness. There is simply no evidence to support the conclusion that Estill County removed Ms. Smith from the call schedule for any reason other than it chose removing Ms. Smith from the call schedule over banning smoking in the dispatch room.

Finally, it is clear from the Commission's Final Order that the true reason for its finding is that it disagreed with Estill County's choice—that is, the Commission deemed it unlawful for Estill County to remove Ms. Smith from the call schedule rather than ban smoking in the dispatch room. This is made clear by the Commission's conclusion that:

> Estill County cannot solve the problem of ETS by firing or refusing to employ non-smokers who complain, which is a violation of Kentucky's Human Rights Act, see KRS 344.040(1)(a). Thus Estill County's proffered reason for removing Ms. Smith from the call schedule to protect her health is pretextual.

[Final Order, ¶ 30.] This conclusion is contrary to law and clearly exceeds the Commission's authority. First, ETS is not a "problem" under Kentucky law. If the Board desires to regulate ETS as an occupational safety and health hazard in Kentucky, there are mechanisms under the statute by which such an action can be taken. But so long as ETS is not recognized as an occupational safety and health hazard in Kentucky, the Commission cannot force Estill County to ban smoking in order to accommodate an employee who expresses an allergy to smoke. Second, the Commission has no authority under the statute to require Estill County to put an individual in a situation that "causes swelling in the head and severe pain." Thus, Estill County can, in fact, solve the problem of an employee claiming that smoke is causing her severe pain by declining to place the employee in a facility that allows smoking. It is clear that the Commission believes that the better response would be to ban smoking in the facility, but there is no law in

Kentucky that requires Estill County to do so. Finally, to the extent the Commission believes there is a violation of KRS 344.040(1)(a), it is free to make a referral to the Kentucky Human Rights Commission, but it has no authority to enforce that statute or punish Estill County for any alleged violation. Thus, the Commission's Final Order is contrary to law and exceeds its authority.

V. The Commission exceeded its authority in ordering Back Pay, Front Pay and Re-Instatement.

As set forth above, the Commission has no authority to require Estill County to prohibit smoking in the workplace, or to require Estill County to allow Ms. Smith to work in a position that Ms. Smith asserted is deleterious to her health. Estill County has legally chosen not to allow Ms. Smith to work in a smoking facility because the smoke causes Ms. Smith a health concern. The Commission clearly disagrees with this action, asserting that Estill County instead should have chosen to ban smoking in the facility, but it is a policy choice that belongs to Estill County, not the Commission. The Commission cannot govern Estill County's policy decisions, and it cannot punish Estill County after the fact for failing to make the choice that the Commission would have preferred. Allowing the Commission to impose civil penalties upon Estill County for refusing to adopt the Commission's desired policies, or attempting to force Estill County to employ a person in a manner that Estill County believes could subject it to potential future liability, is an intrusion on Estill County's sovereign authority and self-governance.

Moreover, Estill County has the right to determine on its own how and in what manner it will employ persons at all times. The Re-Instatement, Front-Pay, and Back-Pay Orders are essentially orders that Estill County must now and perpetually employ Ms. Smith as a part time employee for 21 hours a week. These orders confer a special

status upon Ms. Smith necessitating treatment differing from that applied to any other employee of Estill County. The Commission simply does not have the authority to dictate to Estill County how and when it will employ its personnel.

VI. The Commission's Final Order and the fines, penalties, and/or remedies imposed are barred by absolute sovereign immunity.

It is well established in Kentucky that "[a] county government is cloaked with sovereign immunity." *Schwindel v. Meade County*, 113 S.W.3d 159, 163 (Ky. 2003). Sovereign immunity derives from the "inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity." *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001). In *Withers v. Univ. of Ky.*, 939 S.W.2d 340 (Ky. 1997), this Court definitively set forth the manner in which sovereign immunity can be waived by statute, holding:

> Henceforth, in an effort to avoid the morass we have heretofore been in, we will observe a rule similar to the one found in *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662, 678 (1974), as follows:
>
> We will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

Withers v. Univ. of Ky., 939 S.W.2d at 346, (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464-65, 53 L.Ed. 742 (1909)). The United States Supreme Court has made it clear that in the event that there is a waiver, that "waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261, 119 S. Ct. 687, 691, 142 L. Ed. 2d 718 (1999). Similarly, the Kentucky Supreme Court has explained that "[s]tatutes in derogation of the state's sovereign immunity will be strictly construed in favor of the state

unless the intention of the legislature to do otherwise is clearly expressed in the statute." *Jones v. Cross*, 260 S.W.3d 343, 345 (Ky. 2008).

Here, there is no language in the statutes that waives Estill County's sovereign immunity. The remedies and rights provided by the statute are general in nature, and make no reference or provision for actions against the Commonwealth or County Governments. There is nothing that distinguishes KRS 338.121 from any other statute that provides a civil remedy for a violation. As there is no provision of KRS 338.121 that allows an action against a county, Estill County has absolute sovereign immunity.

VII. Appellant's argument that the Secretary of Labor is entitled to *Chevron*-style deference in his interpretation of KRS 338.121 is not properly before this Court.

Appellant argues that "this [C]ourt may defer to the secretary's interpretation of the discrimination statute, found in the citation issued to Estill County where the secretary determined Ms. Smith's complaint to her employer was a protected activity according to KRS 338.121(3)(a)." [Appellant's Brief at 21.] Appellant goes on to state that "the issuance of citations is an exercise in policy making and also interpretation of the cited statute or standard." [Appellant's Brief at 23.] As support for this position, Appellant cites to the United States Supreme Court's famous decision, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), among other decisions. However, a review of the briefs and arguments presented to the Court of Appeals and Franklin Circuit Court reveals that the Appellant is raising this argument for the very first time before this Court.

There is not one mention of *Chevron* or an assertion by the Appellant that the Cabinet is entitled to deference because it was "interpreting the discrimination statute" in

the Appellant's brief before the Court of Appeals nor is there any mention of this argument before the trial court. "It has long been this Court's view that specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal." *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011), as modified (Sept. 20, 2011). An appellant may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky.1976); *Dever v. Commonwealth*, 300 S.W.3d 198, 202 (Ky. Ct. App. 2009). Because Appellant's argument was not raised below, it is not properly before this Court.[4]

Furthermore, Appellant's argument that the Cabinet's citation is entitled to *Chevron*-style deference is unpersuasive in light of Kentucky law. As the Appellant notes in its brief, this Court held in *Board of Trustees of the Judicial Form Retirement System v. Attorney General of the Commonwealth of Kentucky*, 132 S.W.3d 770, 787 (2003) that "*Chevron* style deference is only granted 'when the agency interpretation is in the form of an **adopted regulation** or **formal adjudication**.'" [Appellant's Brief at 20 (emphasis added).] However, a citation is by no means a "formal adjudication." Appellant makes no corresponding argument that the Commission's ruling is entitled to *Chevron*-style deference because it was a "formal adjudication," and is barred from making such an argument in its reply brief. As previously discussed, "[t]he reply brief is

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[4] Furthermore, as previously noted, the Secretary of Labor sought dismissal of its appeal and this Court granted that request. The Secretary sought dismissal in light of the passage of the amendment to 803 KAR 2:250, reasoning that the controversy at issue is not likely to repeat itself in the future. In his motion, the Secretary stated that "reviewing and adjudicating the merits of Ms. Smith's case alone is hardly a 'special reason' [under CR 76.20(1)] calling for this Court's attention . . . ." [Appellant Commonwealth of Kentucky Secretary of Labor's Motion to Dismiss, p. 4. In the Secretary's Motion, he requested that this Court allow the Court of Appeals opinion to stand. [*Id.*] Accordingly, the Secretary of Labor's withdrawal from this action implies that he is not concerned with this supposed "deference" that he is due in this matter. Furthermore, in requesting that the Court of Appeals opinion stand, the Secretary essentially concedes that the activity of Ms. Smith was not protected before the passage of the amendment.

not a device for raising new issues which are essential to the success of the appeal." *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979).

Because Appellant's argument that the Cabinet is entitled to *Chevron*-style deference is not properly before this Court, and also because such an argument is contrary to Kentucky law, this Court should reject it out of hand.

VIII. The Franklin Circuit Court's decision did not cure the erroneous ruling of the Commission.

Finally, Appellant argues that "any legal error allegedly committed by [the Commission] when interpreting the discrimination statute, was cured on review when the Franklin Circuit Court interpreted the discrimination statute, citing to *Springville Poultry*[.]" [Appellant's Brief, at 26.) As support for this position, Appellant merely states "[t]his is why our General Assembly directed that decisions issued by our review commission would be subject to judicial review: to cure legal errors[.]" [*Id.*] However, the reasoning underlying this argument is circular, as the erroneous decision of a Circuit Court cannot ratify the arbitrary exercise of power by an administrative body. As is clearly demonstrated by the case law cited herein, a Court reviewing an agency's decision does so based on the standard of arbitrariness. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994). Because the Commission acted outside the constraints of its statutory power, and also because its findings were not supported by substantial evidence, its decision was arbitrary and the Franklin Circuit Court erred in ruling otherwise.

CONCLUSION

For the foregoing reasons, Estill County respectfully requests that the Court of Appeals Opinion and Order be affirmed.

Respectfully submitted,

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